

7-11-03
11:55
Cm

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

DIRECTV, INC.,

Plaintiff,

-vs-

Case No. 6:03-cv-680-Orl-22DAB

TIM SPOKISH,

Defendant.

ORDER

I. INTRODUCTION

This cause comes before the Court for consideration of the Defendant's, Tim Spokish, Motion for Summary Judgment (Doc. No. 39), and memorandum of law in support thereof (Doc. No. 41), filed December 23, 2003, to which the Plaintiff, Directv, Inc., responded (Doc. No. 46) on February 2, 2004. Having reviewed the motion and memoranda, this Court **DENIES** the Defendant's Motion for Summary Judgment (Doc. No. 39).

II. BACKGROUND

The Plaintiff, Directv, Inc. (hereinafter, "Direct Television"), is a California corporation with its principal place of business located in the State of California.¹ At all relevant times hereto, the Defendant, Timothy Spokish (hereinafter, "Mr. Spokish"), was a

¹See Complaint for Compensatory, Statutory and Other Damages, and for Injunctive Relief (Doc. No. 2), ¶17 at 5.

resident of the Middle District of Florida.² This is a civil action brought pursuant to the Federal Communications Act of 1934, 47 U.S.C. § 605, and the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C. §§ 2510-22 (“the Wiretap Act”).³

As its name suggests, Direct Television is in the business of providing television programming to millions of subscribers in the United States through a direct broadcast satellite system.⁴ In order to prevent unauthorized and unpaid viewing of its programming, Direct Television encrypts (scrambles) its satellite transmissions and employs conditional access technology.⁵ Conditional access technology consists of “access cards” which, upon activation by Direct Television, decrypts (unscrambles) satellite transmissions, permitting subscribers of Direct Television to clearly view its television programming.⁶

In spite of its elaborate security measures, several companies are marketing illegally modified access cards and other devices (“pirate access devices”) that permit the viewing of Direct Television’s satellite transmissions without authorization by or payment to Direct Television.⁷ Apparently, many of these companies employ Fulfillment Plus, a mail shipping

²*See id.*, ¶18 at 5.

³*See generally id.*

⁴*See id.*, ¶2 at 1-2.

⁵*See id.*, ¶4 at 2.

⁶*See id.*

⁷*See id.*, ¶¶14, 16 &18 at 4-5.

facility located in California, to transact their business.⁸ For this reason, on or about May 25, 2001, Direct Television began executing Writs of Seizure at Fulfillment Plus, securing sales records, shipping records, e-mail communications, credit card receipts, and other records evidencing the sale and purchase of pirate access devices.⁹

Direct Television's investigations revealed that the Defendant purchased pirate access devices.¹⁰ Specifically, the record indicates that on or about April 4, 2001, Mr. Spokish purchased three "MK Unlooper-SU2s" from Canadian Security and Technology (hereinafter, "Canadian Security"), and that he received his order at his address in Cocoa, Florida via the United States Postal Service or another commercial mail carrier shortly thereafter.¹¹

Against that backdrop, Direct Television filed a three count lawsuit against Mr. Spokish on May 22, 2003.¹² Count I of the Complaint alleges that Mr. Spokish received and/or assisted others in receiving Direct Television's satellite signals without authorization, in violation of 47 U.S.C. § 605(a).¹³ Count II alleges that Mr. Spokish intentionally

⁸*See id.*, ¶16 at 5.

⁹*See id.*

¹⁰*See id.*, ¶23 & ¶23(a) at 8; *see also* Doc. No. 49, Ex. A - Plaintiff's First Request for Admissions to Defendant Tim Spokish, ¶8 at 4 and Defendant Tim Spokish Answer to Plaintiff's First Request for Admissions, ¶8 at 1.

¹¹*Id.*, ¶23(a) at 8; *see also id.*, ¶23 at 8; *see also* Doc. No. 49, Ex. A - Plaintiff's First Request for Admissions to Defendant Tim Spokish, ¶8 at 4 and Defendant Tim Spokish Answer to Plaintiff's First Request for Admissions, ¶8 at 1.

¹²*See generally id.*

¹³*See id.*, ¶¶ 29-32 at 9-10.

intercepted, endeavored to intercept, or procured other persons to intercept or endeavor to intercept Direct Television's electronic communications without authorization, in violation of 18 U.S.C. 2511(1)(a).¹⁴ Finally, Count III alleges that Mr. Spokish manufactured, assembled, distributed, sold, and/or possessed pirate access devices, knowing or having reason to know that the design of such devices renders them primarily useful for surreptitiously intercepting satellite transmissions in violation of 18 U.S.C. § 2512(1)(b).¹⁵

On July 10, 2003, this Court entered an order dismissing Count III of the Plaintiff's Complaint with prejudice.¹⁶ Citing rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court concluded that Count III failed to state a claim upon which relief can be granted because 18 U.S.C. §2512(1)(b) does not provide for a private right of action.¹⁷

Turning to the issue at hand, Mr. Spokish now seeks summary judgment.¹⁸ Arguing that Direct Television is incapable of providing evidence sufficient for a reasonable jury to return a verdict in its favor, Mr. Spokish explains his purchase of pirate access devices as part of a computer engineering experiment.¹⁹ Allegedly, the "MK Unlooper-SU2s" were

¹⁴See *id.*, ¶¶ 33-36 at 10-11.

¹⁵See *id.*, ¶¶ 37-40 at 11-12.

¹⁶See *generally* Doc. No. 16.

¹⁷See *id.*

¹⁸See *generally* Docs. No. 39, 40, and 41.

¹⁹See *generally* Docs. No. 39, 40, and 41.

used in a failed attempt to build an encryption device, wherein a computer user could insert a valid smart card into a decoding apparatus to allow for him or her to access a hard drive.²⁰

Direct Television counters Mr. Spokish's allegations by calling attention to evidence that Mr. Spokish purchased pirate access devices directly from an internet company devoted to the illegal interception of Direct Television satellite transmissions; that such pirate access devices have only one function: intercepting Direct Television programming without authorization or payment; that Mr. Spokish was a member of an internet forum known as Pirate's Den, whose purpose was to share information and software relating to the pirating of Direct Television satellite signals; and that Mr. Spokish possessed the necessary hardware (*i.e.*, a satellite dish and receiver) to intercept Direct Television satellite transmissions.²¹

III. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it is one that might affect the outcome of the case. *See id.* The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those materials that

²⁰See Affidavit of Tim Spokish (Doc. No. 40), ¶6 at 1.

²¹See generally Doc. No. 46.

demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant satisfies this requirement, the burden shifts to the non-moving party to “come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). To meet this burden, the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleadings.” Fed. R. Civ. P. 56(e). Nor may the non-moving party rely on a mere scintilla of evidence supporting their position. *See Walker v. Darby*, 911 F. 2d 1573, 1577 (11th Cir. 1990). Rather, for a court to find a genuine issue for trial, the non-moving party must establish, through the record presented to the court, that it is capable of providing evidence sufficient for a reasonable jury to return a verdict in its favor. *See Cohen v. United Am. Bank*, 83 F. 3d 1347, 1349 (11th Cir. 1996). When a court considers whether or not to enter summary judgment, it views all of the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Publ’g Co.*, 9 F. 3d 913, 918 (11th Cir. 1993).

IV. LEGAL ANALYSIS

A. COUNT I

Count I of the Complaint alleges that Mr. Spokish violated 47 U.S.C. § 605(a). *See* Complaint (Doc. No. 2), ¶ 30 at 9. In order to establish a violation of that provision, Direct Television must demonstrate that Mr. Spokish: (1) received; (2) an interstate communication; (3) by way of wire or radio; (4) and that he divulged or published such communication; (5) other than through designated or authorized channels; (6) to

unauthorized receivers. *See Joe Hand Promotions v. D.M.B. Ventures, Inc.*, 1995 U.S. Dist. Lexis 7587, *14 (E.D. La. May 31, 1995); *see also Snider Communications v. Cue Paging Corp.*, 840 F. Supp. 664, 669 (E.D. Ark. 1994).

Applying these elements to the record evidence presented here, this Court finds that factual issues remain precluding summary judgment.

Viewed in the light most favorable to Direct Television, the evidence shows that the Defendant accessed a website aimed at illegally intercepting Direct Television satellite transmissions. It further shows that he purchased three pirate access devices therefrom; devices which have one useful purpose: facilitating the illegal interception of Direct Television transmissions. *See* Affidavit of Michael Barr (“the SU2 Code purchased by Mr. Spokish, along with the Unlooper, is designed exclusively for the purpose of circumventing DIRECTV conditional access controls . . . [It] is not marketed for legitimate use, and I have not identified a legitimate use for SU2 firmware”). Finally, record evidence establishes that Mr. Spokish had the necessary hardware to intercept Direct Television satellite transmissions, *see* Spokish Deposition at pg. 26, line 17 through pg. 32, line 22, and that he belonged to a pirate website associated with the illegal interception of Direct Television satellite transmissions, *see* Declaration of Lacey Walker, Jr.

Given this circumstantial evidence, a reasonable jury could reject Mr. Spokish’s self-serving testimony and instead conclude that wiretap violations occurred.

The decision rendered in *Directv, Inc. v. Miller*, Case No. 6:03-cv-1027-Orl-19KRS, Doc. No. 29 (M.D. Fla. Nov. 20, 2003) solidifies this holding. There, Judge Patricia C.

Fawsett denied a motion for summary judgment wherein Direct Television presented only circumstantial evidence, commenting:

Based on their life experience, a jury could reasonably assume that people only buy electronic equipment such as televisions, computers, or (in the case of Defendant) satellite piracy unloopers when they plan to use such equipment. It would be a strange world, after all, if people regularly bought such equipment and then put it in the closet to collect dust.

Id. at 7.

By parity of reasoning, it would also be a strange world if people like the Defendant purchased pirate access devices intending to use them for a purpose other than that for which they were exclusively designed: pirating Direct Television.

B. COUNT II

Count II of the Complaint alleges that Mr. Spokish violated 18 U.S.C. § 2511 (1)(a). *See* Complaint (Doc. No. 2), ¶ 34 at 10. In order to establish a violation of that provision, Direct Television must demonstrate that Mr. Spokish: (1) intentionally; (2) intercepted, endeavored to intercept, or procured another person to endeavor to intercept; (3) the contents of; (4) an electronic communication; (5) using a device. *See Blumofe v. Pharmatrak, Inc. (In re Pharmatrak, Inc.)*, 329 F. 3d 9, 18 (1st Cir. 2003).

For the reasons identified above, the Court also denies Mr. Spokish summary judgment on Count II.

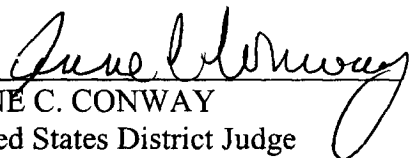
V. CONCLUSION

Based on the foregoing, it is **ORDERED** that:

1. The Defendant's, Tim Spokish, December 23, 2003 Motion for Summary Judgment (Doc. No. 39) is **DENIED**.

2. The case shall **REMAIN** on the May 2004 trial calendar.

DONE and **ORDERED** in Chambers, in Orlando, Florida this 19th day of February, 2004.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
Administrative Law Clerk

F I L E C O P Y

Date Printed: 02/20/2004

Notice sent to:

C
2/20
✓
Steven R. Loewenthal, Esq.
Law Office of Steven R. Loewenthal
209 S. Howard Ave.
Tampa, FL 33609

6:03-cv-00680 cbh

✓
Viktoria Collins, Esq.
Stump, Storey, Callahan, Dietrich & Spears, P.A.
37 N. Orange Ave., Suite 200
P.O. Box 3388
Orlando, FL 32802-3388

6:03-cv-00680 cbh